

IMPACT SITE WORKS, LLC

Employer

and

INTERNATIONAL UNION OF OPERATING,
ENGINEERS LOCAL 150, AFL-CIO

Petitioner

[illegible]

Case No.: 13-RC-271615

EMPLOYER'S REQUEST FOR REVIEW AND MEMORANDUM IN SUPPORT

Employer Impact Site Works, LLC (“Employer” or “the Company”), by and through its undersigned counsel and pursuant to 29 C.F.R. § 102.67(c) hereby requests that the National Labor Relations Board (“the Board”) review Acting Regional Director (“Acting RD”) Paul Hitterman’s March 8, 2021 Decision and Direction of Election (“DDE”) in the above captioned matter. As set forth herein, in connection with the February 16, 2021, evidentiary hearing on issues presented by the Representation-Certification Petition (“RC Petition”) filed by the International Union of Operating Engineers, Local 150 (“Union” or “Petitioner”), the Acting RD made a clearly erroneous decision finding that the petitioned for unit is an appropriate unit. The Acting RD’s finding that the petitioned for operators are a sufficiently distinct, recognizable group and that their distinct interests outweigh their shared interest with the employees that the Employer seeks to include is not supported by the record evidence.

I. GENERAL BACKGROUND

A. Impact Site Works, LLC

The Company performs environmental remediation to contaminated, unusable property so that it can be used for commercial use. (Transcript [“Tr.”] 18.) This entails the removal of contaminants from soil, surface water, groundwater, sediment, etc. (Tr. 19.) The contaminants could be shipped off the jobsite or treated on site and then encapsulated so they do not contaminate any of the surrounding areas. Id. Once completed, the property is safe for future, commercial use. (Id.) The Company is currently remediating 5135 Kennedy Avenue, East Chicago, Indiana (the “Jobsite”). The Jobsite is approximately 240 acres. (Tr. 47.) The busy season ranges from mid-April to November. (Tr. 109).

B. Employees

1. Supervisors

Chris Tripoli (“Tripoli”) is the construction coordinator at the Jobsite. (Tr. 17-18.) As construction coordinator he assigns job duties to the workforce on a daily basis. (Tr. 18.) Tripoli trains the workforce when needed and he also functions as the lead operator. (Id.)

2. Equipment Operators

Equipment operators operate equipment on the Jobsite. (Tr. 21.) The Employer does not require its equipment operators to be certified by a third party trainer. (Tr. 22.) The Employer’s equipment operators are Caleb Boose, Ted Bos, Steve Coffman, Andrew DeLuca and Rick Dempsey. (Board Exhibit [“B”] 3.) When not operating equipment, the equipment operators perform equipment maintenance and repair, erect and move signage, assist and direct truck traffic onsite, tree clearing, covering and uncovering stockpiles, and site cleanup. (Tr. 21-22.)

3. Junior Operators

Junior operators operate equipment on the Jobsite. (Tr. 21.) The junior operators have less seat time and experience and require more supervision and training than the equipment operators. (Tr. 21 & 22.) The Employer does not require its junior operators to be certified a third party trainer. (Tr. 22.) The Employer's junior operators are William Bennett, Arthur Bush, Joseph Campbell, Leonard Jones and Patricia Tripoli. (B. 3.) When not operating equipment, the junior operators perform equipment maintenance and repair, erect and move signage, assist and direct truck traffic onsite, tree clearing, covering and uncovering stockpiles, and site cleanup. (Tr. 21-22.)

4. Scale Operators

Scale Operators weigh the inbound or outbound trucks to determine the amount of material either brought in or exported. (Tr. 22.) The scale operator is in contact with all employees on the Jobsite via radio. (Tr. 40.) The scale operator uses the radio to alert the employees as to what material is coming inbound or outbound so the employees know the proper location of the materials. (Id.) The scale operators are Lynn Robles and Patricia Tripoli. (Tr. 28 & 40.) Arthur Bush is able to fill in as the scale operator if Lynn Robles or Patricia Tripoli are unavailable. (Tr. 40.)

C. Equipment

Impact uses the following equipment to assist in the remediation process: 4 excavators; 2 finish dozers (aka grader dozer); 2 wheel loaders (aka pay loader); 1 pushing dozer; 1 compaction roller ("roller"); 1 skid steer; 1 water truck; 1 street sweeper; 1 material screening plant; 1 crusher plant; and 4 dump trucks. (Tr. 22-23.)

The excavator is the most versatile piece of equipment on the job site. (Tr. 25.) It is used to place material into the screening plant, the crushing plant, remediation activities, breaking up concrete or oversized rock and tree removal. (Id.) The excavator operators are Caleb Boose, Ted Bos, and Andrew Deluca. (Id.) Leonard Jones and Arthur Bush are in training. (Id.) Arthur Bush also operates the excavator with the hammer attachment to break up concrete. (Tr. 85.)

The grader dozer is used to place material at a fine grade. (Tr. 23.) Put another way, the grader dozer is used to push out material to make it level and refined. (Id.) Caleb Boose and Ted Bos are the grader operators. (Id.) Leonard Jones is in training. (Tr. 23-24.)

The wheel loader is a large bucket machine with four wheels. (Tr. 25 & Employer Exhibit ["E"] 1.) It is used during the screening and crushing process to remove materials coming off the various belts and stockpile – materials that are stockpiled in large piles to be processed through the material screener – to be transported to another location on site, creating stockpiles of the different sized materials. (Tr. 24-25 & 36.) The wheel loader is also used to load the dump trucks with materials to be exported or transferred around the job site for remediation activities. (Tr. 26.) The wheel loader operators are Rick Dempsey, Steve Coffman and Joseph Campbell. (Id.)

The pushing dozer is used to push up the stockpile. (Tr. 24.) The pushing dozer operators are Caleb Boose, Ted Bos and Leonard Jones. (Tr. 25.) Rick Dempsey is in training. (Id.)

The roller is used to compact material on the site after excavation and during backfill. (Tr. 28 & E. 2.) Each employee on site has operated the roller with the exception of Lynn

Robles. (Tr. 28.) The main roller operators are Arthur Bush, Joseph Campbell and William Bennett. (Tr. 28 & 90.)

The skid steer has multiple attachments and can be used for a vast array of jobs. (Tr. 31 & E. 4.) It is used in support of screening and crushing operations. It is also used to unload equipment and supplies to be used in the remediation process from trucks and trailers such as silt fencing. (Id.) The skid steer is also used to transport totes around the Jobsite. (Tr. 210 & 233.) Each employee on the Jobsite can operate the skid steer except Lynn Robles and Patricia Tripoli. (Tr. 32.) The main skid steer operators are Joseph Campbell and Arthur Bush.

The water truck is used for dust suppression on the roads coming in and out of the Jobsite. (Tr. 33 & E. 5.) It is also used as dust suppression during the material screening process, the crushing process and any excavation. (Id.) Each employee on the Jobsite can operate the water truck with the exception of Lynn Robles. (Id.)

The street sweeper is used to clear mud and dirt from the Jobsite roadways, the parking area used for the equipment repair and parking area in front of the office trailers. (Tr. 30 & E. 3.) Every employee on the Jobsite can operate the street sweeper except Lynn Robles. (Tr. 30.) The main street sweeper operators are William Bennett, Joseph Campbell and Arthur Bush. (Id. 30.)

The material screener is piece of machinery used to separate wood, metal and oversized concrete and stone from processed material to be used during the remediation process. (Tr. 34.) The material screener is fed by an excavator and then a wheel loader transports the screened material to stockpiles of the different sized material. (Id.) Sometimes a third employee acts as a ground man, with a skid steer at his disposal, to help keep the screener free and clear of debris. (Tr. 34-35). The operators of the excavator, wheel loader and skid steer are noted above.

The crusher is used to transform oversized material (rock and concrete), whether it arrives onsite oversized or is still oversized after screening, and crushes it down to a size that can be utilized in the remediation process. (Tr. 37.) Similar to the screener, the crusher is fed by an excavator. (Id.) The crushing operation is more intricate than the screening process because metal and wood can damage the crusher. (Id.) Accordingly, there are times when each and every employee on site (except Lynn Robles) is hand picking through the materials for any damaging debris before the material is fed to the crusher. Id. The excavator operators are noted above.

The dump trucks are used to transport material (processed or unprocessed) wherever it is needed in and around the Jobsite. (Tr. 38.) The dump truck operators are Steve Coffman, Patricia Tripoli, Caleb Boose, Leonard Jones and Rick Dempsey. (Id.)

D. Terms and Conditions of Employment

Tripoli supervises and assigns work to every employee on the Jobsite with the exception of whoever is performing the work of the scale operator. (Tr. 43-44.) The scale operator position is supervised by Faith Gruber. Each of the employees listed in B. 3 work at the same Jobsite. (Tr. 40.) Tripoli records each of the employees' work time, including the scale operator. (Tr. 114.) Each employee works 8-12 hour days on the day shift. (Id.) Overtime for all of the employees is voluntary. (Tr. 61-62 & 109.) The workday for all employees fluctuates based upon weather conditions, soil conditions and how much work needs to be completed. (Tr. 109-110.)

Each of the employees listed in B. 3 are paid hourly and on a weekly basis. (Id.) Each of the employees are paid similar wages. (Id.) The operators are paid between \$21.00 and \$24.00 per hour. (Tr. 42.) Junior operators are paid between \$16.00 + and \$21.00 per hour. (Id.) The

scale operator (Lynn Robles) makes \$16.75 per hour. Patricia Tripoli makes more than \$16.75 per hour because she also operates equipment.

Each of the employees listed in B. 3 are offered the same benefits. (Id.) Specifically, each employee receives 3 days paid time off. (Id.) Each employee is eligible for the Employer's medical, dental and vision programs. (Id.) After one year of service, each employee is eligible to participate in the Employer's retirement program. (Id.)

Employees can progress from operating light equipment to heavy equipment. (Tr. 117.) For example, Joe Campbell progressed from operating the skid steer and street sweeper to operating the wheel loader. (Tr. 117.)

II. LEGAL ARGUMENT

A. Standard of Review

The Board may grant a request for review of a Regional Director's decision for any of the following reasons: (1) That a substantial question of law or policy is raised because of the absence of, or a departure from, officially reported Board precedent; (2) that the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; (3) that the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; and (4) that there are compelling reasons for reconsideration of an important Board rule or policy. See, 29 C.F.R. § 102.67(d). Here, the Acting RD's decision on substantial factual issue was erroneous and not supported by the record evidence which, in turn, resulted in a misapplication of the community of interest test set forth in *PCC Structural, Inc.*, 2017 NLRB LEXIS 618 (2017).

B. Legal Standard

The Board uses the traditional community of interest standard when an employer contends that the smallest appropriate unit must include additional employees. See, *PCC Structural, Inc.*, 217 NLRB LEXIS 618, *2-3 (2017). Accordingly, in cases where unit appropriateness is questioned, the Board analyzes whether the employees in the petitioned for unit share a community of interest sufficiently distinct from the interest of those employees excluded from the petitioned for group to merit a finding that the proposed group constitutes a separate and appropriate unit. *Id.* at 21. The Board applies a multi-factor test to assess the following:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id. Ultimately, the Board's inquiry is to determine "whether the interests of the group sought (operators) are *sufficiently distinct* from those of the other employees (junior operators) to warrant the establishment of a separate unit." *Id.* at 22, citing *Wheeling Island Gaming*, 355 NLRB 637, 642 (2010) (emphasis in original.)

C. The Smallest Appropriate Unit Consists of All Employees Working at the Jobsite

All of the Company's employees share an unequivocal community of interest. They work similar hours, are paid similar wages, receive the same benefits, work on the same Jobsite, share the same supervisor who assigns each of them work, operate equipment (in some instances, the same equipment as those operators in the petitioned for unit), sometimes work alongside one another, are in constant contact with one another via 2-way radio, all the while with the same

goal in mind – pitching in to do whatever is needed to successfully remediate the Jobsite. Thus, all of the employees listed in B. 3 should be included in the unit. See, *Publix Super Markets, Inc.*, 343 NLRB 1023 (2004) (finding petitioned for unit did not have a separate community of interest because there was substantial functional integration between the units specifically in regards to plant-wide support operations in addition to plant-wide interchange and plant-wide uniformity in terms and conditions of employment). See also, *Aztar Indians Gaming Company, LLC*, 249 NLRB 603 (2007) (petitioned for unit did not possess community of interest separate and distinct from excluded employees due to interchange, integration and contact); *J.C. Penney Co.*, 328 NLRB 766 (1999) (excluded employees shared community of interest with the petitioned for unit and were included in the unit found appropriate); *United Rentals, Inc.*, 341 NLRB 540 (2004) (Board overturned Regional Director and determined that only an overall unit of all employees at the facility [including the branch associate who would otherwise be a unit of one], was appropriate due to overlapping duties and interchange between the excluded employees, similar hours [even though starting times were different], similar wages [\$11 – \$17.50¹] per hour and benefits, common supervision and assignment of work from the same individual). Specifically, the Board concluded as follows:

The excluded employees also share common terms and conditions of employment with the employees in the petitioned-for unit. The excluded employees work similar hours and are subject to the same time and attendance policy as the petitioned-for employees. Furthermore, all employees at the facility are subject to common labor relations authority and oversight by Branch Manager Ferdinandi. Ferdinandi sets all employee work schedules, and he directly assigns duties to employees. All employees receive the same medical and leave benefits. The wages of the excluded counter employees are comparable to the wages of the drivers and most mechanics. Although the counter employees are covered by a different profit sharing plan from the petitioned-for employees, the parts associate and branch associate are covered by the same plan as the petitioned-for employees. Finally, two counter employees and the parts associate previously

¹ With the Exception of employee who made \$22 per hour.

worked as yard employees, and one of those counter employees also previously worked as driver.

Id. at 541-542. Contrary to the Acting RD's assertions, the facts herein are similar to *United Rentals, Inc.* and all employees (including Lynn Robles) should be included in the unit.

Additionally, despite the fact that the Petitioner seeks to represent all full-time and regular part-time operators, during the hearing they sought to differentiate between heavy equipment operators and light equipment operators. However, the express language of the unit description only states "operators" and does not differentiate between the two. Further, the Petitioner's own witnesses could not agree as to what was heavy equipment and what was light equipment. For instance, Ted Bos testified on direct that heavy equipment included the bulldozer, excavator, loader, skid steer, roller, sweeper, material screener and crusher. (Tr. 140.) On cross examination he changed his mind and stated that the sweeper and skid steer were not heavy equipment. (Tr. 152.) He also testified that the water truck and dump trucks were not heavy equipment. (Tr. 157.) Conversely, Rick Dempsey and Leonard Jones testified that the roller is not heavy equipment. (Tr. 196 & 233-234.) However, Leonard Jones went to a trade school where students are trained how to operate equipment. (Tr. 223-224.) One of the pieces of equipment he was trained on was a roller, along with a dozer, excavator, wheel loader, grade-all and 6-wheel haul trucks. (Tr. 224.) Clearly, the school views the roller and dump trucks as heavy equipment.

Each of the Petitioner's witnesses acknowledged having personally witnessed and or had knowledge that Joe Campbell operates the pay loader, excavator, roller and skid steer; that Arthur Bush operates the roller and operated the dozer a single time; that William Bennett operates the skid steer, street sweeper and water truck (Steve Coffman also operates the water truck); and that Patricia Tripoli operates the dump truck. (Tr. 141, 150-151, 156, 181-183, 193,

195, 197-198, 207-210, 216, 218, 230-231, 233, 241-242, 259-260 & 265-266.) These same witnesses testified that Patricia Tripoli regularly operated a dump truck during the summer months and, likewise for Arthur Bush and Joe Campbell with respect to the roller. (Tr. 156, 182-183, 198, 210, 218, 230, 259-260 & 265-266.) Additionally, some of the Petitioner's witnesses acknowledged that they are not privy to all of the work that Chris Tripoli assigns to the junior operators nor are they aware what equipment the junior operators are operating when they are unable to physically see what they are doing. (Tr. 158-159 & 266.)

The Acting RD also made much of the fact that the operators had meetings with Chris Tripoli separate and apart from the junior operators. Yet, each of Petitioner's witnesses acknowledged that junior operators, including Patricia Tripoli were indeed present for some of these meetings during the summer months. (Tr. 134, 176-178, 204-205, 229-230, 259.) Similar to above, the testimony offered by the Petitioner was contradictory. One witness testified that Patricia Tripoli would attend the morning meetings as many as 3-4 times per week during the summer months while another witness stated that he had *never* seen Patricia Tripoli in attendance at a morning meeting. (Tr. 177-178 & 259.)

The Company asserts that all the employees listed in B. 3 (excluding Lynn Robles) perform operating engineers' work. Specifically, Petitioner's own collective bargaining agreement ("CBA") defines operating engineer work as follows:

Except as hereinafter provided, the operation of all Engines and Boilers on Building and Construction work operated by Steam, Hydraulic, Electrical, Compressed Air, Gas or Gasoline, **or any other motive power**, including but not limited to Pumps, Pump Cretes, Stone Crushers, Air Compressors, Welding Machines, Conveyors, Cableways, Clamshells, Derrick Cars, Generators and Motors, Overhead Cranes, Orange Peel Buckets, Pile Drivers, Floating Derricks, Locomotives, Locomotive Cranes, All Earth-Moving, Concrete and Blacktop Equipment, and all Elevators used for Building Construction or for alteration work, shall be the work of the Operating Engineer.

(B. 6, Article I, Section 6, p. 9) (emphasis added.) The CBA maintains that all lubing or any other servicing of equipment in the field will only be performed by the bargaining unit. (Id. at Article VI, Section 11 Maintenance and Heavy Duty Repair.) Article VII, Section 15, Small Equipment states that operating engineers will operate small equipment such as small air compressors, small generators, small electric winches, welding machines and sump pumps four inches or under. Most importantly, the CBA unequivocally states that the operation of rollers, skid steer loaders and off road trucks is operator work. (B. 3, Article Section VII, Bobcats, Article IX, Section 1, Wage Rates and Fringe Benefits & Off Road Trucks, p. 85.)

The express language of the CBA (B. 6) makes clear that the Petitioner's petition only seeks to include those employees it has organized. Nevertheless, pursuant to § 9(c)(5) of the Act, the Region is prohibited from giving controlling weight to the extent to which the employees have organized. Notwithstanding, the Acting RD wholly disregarded this CBA reasoning that "this CBA related to construction work in Illinois does not pertain to any work being performed at the East Chicago, Indiana jobsite," and, as such concluded that the CBA had "no relevance." The Acting RD's reasoning was results driven and violated § 9(c)(5) of the Act.

1. The Junior Operators and Scale Employee (Patricia Tripoli) Are Dual Function Employees

Not only do the junior operators and scale operator (Patricia Tripoli) share a community of interest with the equipment operators they also perform bargaining unit work, i.e. operate equipment. Consequently, they are dual functioning employees who perform both unit and non-unit work. Generally, the same community of interest tests that apply to dual function employees as are applied to part-time employees. See, *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). See also, *Wilson Engraving Co.*, 252 NLRB 333, 334 (1980). Nonetheless, inclusion of a dual function employee within a particular unit does not require a showing of

community-of-interest factors in addition to the regular performance of a substantial amount of unit work. See, *Fleming Industries*, 282 NLRB 1030, 1030 fn. 1 (1987). See also, *Oxford Chemicals*, 286 NLRB 187, 188 (1987) (once it is shown that a dual-function employee has a substantial and continuing interest in a particular unit's terms and conditions of employment, "it is both unnecessary and inappropriate to evaluate other aspects of the dual-function employee's terms and conditions of employment in a kind of second tier community-of-interest analysis").

In *Berea Publishing*, 140 NLRB at 519, the Board noted that the "policies of the Act are best effectuated by according to each the same rights and privileges in the selection of the majority representative for the unit in which he works." Accordingly, the Board will perceive no distinction between the part-time employee, who may work for more than one employer, and the employee who performs dual functions for the same employer. *Id.* Based on the teachings of *Berea Publishing*, the Board has consistently held that employees, such as the junior operators (including Patricia Tripoli) who perform more than one function for the same employer may vote, even if they spend less than the majority of their time on unit work, so long as they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions of the unit. See e.g., *Harold J. Becker Co.*, 343 NLRB 51 (2004); *Medlar Electric, Inc.*, 337 NLRB 796, 797 (2002); *Ansted Center*, 326 NLRB 1208 (1998); *Air Liquide America Corp.*, 324 NLRB 661, 662 (1997); *Avco Corp.*, 308 NLRB 1045 (1992); *Continental Cablevision*, 298 NLRB 973, 975 (1990); *Alpha School Bus Co.*, 287 NLRB 698 (1987); *Oxford Chemicals*, 286 NLRB 187 (1987).

There is no clear cut distinction concerning the requisite amount of time needed to be expended performing unit work to affirm the inclusion or exclusion of dual-function employees.

Instead, the Board makes this determination on a case by case basis. See, *Bredero Shaw*, 345 NLRB 782, 786 (2005). Notwithstanding, following the teachings of *Berea Publishing*, the Board has found dual-function employees have a substantial interest and should be included in a unit when the dual-function employees perform unit functions for less than half the time. See, e.g., *Wilson Engraving Co.*, 252 NLRB at 334. For instance, the Board commonly finds that dual-function employees should be included in a bargaining unit if they spend 25 percent or more of their time performing unit work. See, *WLVI Inc.*, 349 NLRB 683, 686 fn. 5 (2007). See also, *Avco Corp.*, 308 NLRB at 1047 and *Medlar Electric, Inc.*, 337 NLRB at 797 (the Board included a dual-function employee who spent at least 25 to 30 percent of his time performing unit work).

D. Lynn Robles Should Be Included So As Not To Be A Unit Of One

The junior operators, including Patricia Tripoli, should be included in the petitioned for unit. If so, Lynn Robles would be a one-person residual unit. As such, she would be foreclosed from exercising her § 7 right to representation. The Board has long found that residual units of one employee are undesirable. See, *Klochko Equip. Rental, Co. Inc.*, 361 NLRB No. 49, slip op. at 1, n.1 (Sept. 26, 2014) (“We note that if the employee in the Saginaw voting group were not included in the unit, he would constitute a one-person residual unit and would be foreclosed from exercising his Sec. 7 right to representation.”) (citing *Vecellio & Grogan*, 231 NLRB 136, 136-37 (1977); *Victor Industries Corp. of California*, 215 NLRB 48, 49 (1974)). See also, *N. Jersey Newspapers Co.*, 322 NLRB 394, 396 (1996) (noting that the “Board has long found” a residual unit of one employee to be undesirable).

III. CONCLUSION

As noted in *PCC Structural, Inc.*, the Board must ensure that the Union’s proposed unit is not arbitrary or merely dependent on the extent of the union’s organizing. Likewise, as noted

in § 9(c)(5) of the Act, in determining whether a unit is appropriate, “the extent to which the employees have organized shall not be controlling.” Thus, based upon all of the above, and in accordance with *PCC Structurals, Inc.*, the excluded employees do not have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with the petitioned for unit members. Accordingly, the smallest appropriate unit found must include all of the Employer’s employees at the Jobsite.

Dated at Columbus, Ohio on this 18th day of March 2021.

Respectfully submitted,

/s/ Aaron T. Tulencik

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 18, 2021, an electronic original of the Employer's Request for Review was filed the National Labor Relations Board, Office of the Executive Secretary, Department of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing were transmitted to the following individuals by electronic mail:

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